SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 487

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ROBERT WILKERSON,

Petitioner,

—v.—

WATERFORD PARK, INC., a corporation, Chester, West Virginia, CARLYLE JOHNSON, JAY EYSTER and JOSEPH P. BROCATOR, stewards, Waterford Park Race Track, Chester, West Virginia,

Respondents.

RUSSELL APPLEBEE,

Petitioner,

—v.—

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MILTON J. DALGO,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JACKSON, NASH, BROPHY, BARRINGER & BROOKS
Attorneys for Petitioners
330 Madison Avenue
New York, New York 10017

Of Counsel

WILLIAMSON PELL, JR.
ROGER D. SMITH
LAWRENCE P. MCGAULEY
ROBERT W. CINQUE

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Robert Wilkerson, Russell Applebee and Milton J. Dalgo pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in the above-entitled consolidated cases on May 26, 1969.

Opinions Below

No opinion was delivered in the Supreme Court of Appeals of West Virginia. The opinion of the court below, the Circuit Court of Hancock County, has not been officially reported to date, but is appended hereto as Appendix A, *infra*.

Jurisdiction

The judgment of the Supreme Court of Appeals of West Virginia was dated and entered on May 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

Did West Virginia, which actively participates in the business of conducting thoroughbred horse racing for profit, deprive certain duly-licensed jockeys of their rights under the Fourteenth Amendment to the United States Constitution by permitting them to be excluded from a race track in West Virginia, without any hearing or specified reason?

Constitutional, Statutory and Regulatory Provisions Involved

The constitutional, statutory and regulatory provisions involved are set forth in Appendix B, *infra*.

Statement of the Case

Originally, thoroughbred racing was purely a sport. In recent years, with the advent of pari-mutuel wagering made possible by modern "totalizer" equipment, it has become a business conducted jointly by private "racing associations" and the various states. Twenty-six states derive a substantial portion of their revenue from this business by retaining a portion (up to 10%) of the pari-mutuel pool on each race. In West Virginia, which licenses racing to be conducted on more days of the year than any other state, this business is carefully restricted by statute, regulated by the West Virginia Racing Commission and supervised by its agents, the stewards at each race track.

The petitioners, Robert Wilkerson, Russell Applebee and Milton J. Dalgo, are jockeys by trade. They are independent contractors who are hired on a race-by-race basis by horse owners to ride horses in flat races at thoroughbred race tracks. They are now, and at all times pertinent hereto have been, duly licensed by the West Virginia Racing Commission to ride as jockeys in West Virginia (R. 1).

Waterford Park, Inc. is a West Virginia corporation which owns and operates a race track in Hancock County, West Virginia and is regularly licensed by the West Virginia Racing Commission to conduct horse race meetings

at its track (R. 2). James F. Edwards was at all times pertinent hereto the owner and President of Waterford Park, Inc.

The individual respondents, Caryle Johnson, Jay Eyster and Joseph P. Brocator, were the resident stewards at the race track at all times pertinent hereto and as a board are an agency of the West Virginia Racing Commission of the State of West Virginia (R. 12).

On May 3, 1968, the petitioners were individually notified in writing by Edwards, as President of Waterford Park, Inc., that they would be permanently barred from the grounds of its race track beginning seven days after receipt of such notice (R. 3). No reason was set forth in the notices except Edwards' judgment that petitioners' exclusion was "in the best interests of racing". The respondent stewards, representatives of the State of West Virginia at the track, refused to intervene formally but concurred in the action of Waterford Park, Inc. (R. 5).

Upon the expiration of seven days, petitioners were in fact barred from the track and could not obtain employment in their trade. They suffered very severe economic and family consequences as a result (R. 3).

The ban followed a long period of intimidation and coercion by the track management (R. 6). The petitioners believe that they were banned because they were the sole committeemen at that track of Jockeys' Guild, Inc., a national organization formed to maintain the highest standards among jockeys and uphold the best interests of horse racing (R. 4). As such, they had objected to racing on frozen and unsafe tracks and had resisted attempts to turn Guild members into "company" men—that is, to bring

them so completely under the control of track management that they could not exercise independent judgment and honestly fulfill their obligations to their employers and the public. Respondents knew the severe economic consequences which their act would have on petitioners.

Petitioners thereupon filed a petition with the West Virginia Racing Commission for a hearing regarding their exclusion (R. 15). The Commission denied their request, giving as its reason that "there are no rulings against the named subjects and, therefore, no apparent violation of the rules and regulations of this Commission" (R. 18).

Petitioners brought actions for injunctive relief in the Circuit Court of Hancock County, West Virginia (R. 1, 21, 35). The parties agreed to separate the issues of law and damages. Waterford Park, Inc. then moved to dismiss the complaint on the ground of an asserted common-law right to exclude the petitioners, and the stewards moved to dismiss on separate grounds. The court treated the motion of Waterford Park, Inc. as a demurrer and all the facts pleaded in petitioners' complaints as true (R. 69). Surprisingly, it then granted the stewards' motions on grounds of improper venue and Waterford Park's motion on the ground that it had "the absolute common law right to exclude, whether it be patron, rider or anyone else" (R. 70, 71).

Petitioners then filed a petition for writ of error in the Supreme Court of Appeals of West Virginia, a copy of which is appended hereto as Appendix C, *infra*. This petition was denied, after oral argument, without opinion. The judgments of the Circuit Court and the Supreme Court of Appeals are appended hereto as Appendix D, *infra*.

Both the Circuit Court of Hancock County and the Supreme Court of Appeals of West Virginia erred in failing to recognize that petitioners were being denied rights guaranteed to them by the Fourteenth Amendment to the United States Constitution. This federal question was raised in the Circuit Court of Hancock County by the allegations in petitioners' complaints that Waterford Park, Inc. had acted arbitrarily and denied plaintiffs their rights thereby (R. 2 para. (8); R. 4 para. (12); and R. 5 para. (17)), in the arguments based on the Fourteenth Amendment made to the Circuit Court of Hancock County in the supplemental memorandum on behalf of plaintiffs, which was referred to in the judgment of that court (R. 72), and on oral argument. Federal questions again were raised in the tenth assignment of error in the petition for a writ of error to the Supreme Court of Appeals of West Virginia (Appendix C, *infra*) and on oral argument before that court. These federal questions were summarily dismissed by both courts.

Argument for Writ

The Supreme Court of Appeals of West Virginia, by refusing to review the decision of the Circuit Court of Hancock County, let that decision stand. The decision was that Waterford Park, Inc., which was licensed by the State of West Virginia to conduct a thoroughbred race meeting, could arbitrarily and without any reason or hearing exclude three duly licensed jockeys from the track premises and thus prevent them from pursuing their profession. It is respectfully submitted that the decision is demonstrably offensive to the Fourteenth Amendment to the United States Constitution.

I.

Petitioners were deprived of their rights guaranteed by the Fourteenth Amendment.

When petitioners were barred from Waterford Park without notice or hearing and for no specific reason, they were deprived of their procedural and substantive rights without due process of law and were denied the equal protection of the laws, all in violation of the Fourteenth Amendment.

a. *Petitioners were excluded from the race track without procedural due process of law*

It was incumbent upon Waterford Park, Inc., the stewards at the track, the West Virginia Racing Commission, and the courts of West Virginia to observe all of the procedural rights guaranteed by the Fourteenth Amendment in any proceeding which deprived petitioners of their freedom to ride at Waterford Park.

In *Schroeder* v. *City of New York,* 371 U.S. 208 (1962), this Court held that, in any proceeding which is to be accorded finality, all interested parties must be given notice which is reasonably calculated under all the circumstances to apprise them of the pendency of the action and to afford them an opportunity to present their objections. In *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1962), this Court held that an attorney who had not been admitted to practice in New York because of the adverse report of another attorney was entitled to notice, a hearing, and the right to confront his accusers. More recently, this Court has held that an attorney is entitled to

all the procedural guarantees of due process in a state disbarment proceeding. *In Re Ruffalo,* 390 U.S. 544 (1967).

Here, petitioners were summarily advised that they were barred from entering the race track in letters from Edwards, the President of Waterford Park, Inc. They had never been advised that action was contemplated against them; they had never been notified of the reasons why they might be barred; they had never been afforded a hearing or other opportunity to speak in their own defense; they had never been confronted by those who thought they should be barred (if there were any besides Edwards and the resident stewards, two of whom were on his corporation's payroll, although agents of the State). In other words, petitioners were not afforded any of the rights to procedural due process which this Court said all persons are entitled to in *Schroeder* and *Willner, supra.* Their exclusion was a *fait accompli.*

The denial of these procedural rights to the petitioners was particularly serious for them in the light of the effect which their exclusion from Waterford Park had upon their ability to earn a living and support their families. In *Greene* v. *McElroy,* 360 U.S. 474 (1959), this Court held that removing the security clearance of an aeronautical engineer resulted in a substantial restraint upon his private employment opportunities. The Court ordered that the engineer be afforded a fair hearing in accordance with the requirements of procedural due process. In *Meredith* v. *Allen County War Memorial Hospital Comm'n,* 397 F. 2d 33 (6th Cir. 1968), the Sixth Circuit held that a doctor who was dismissed from a public hospital was entitled to all of the procedural rights guaranteed by the due process clause. The court found these rights particularly

important because the action taken by the hospital might easily foreclose him from practicing his profession elsewhere. It noted the limited number of hospitals in the area and the stigma attached to dismissal.

Edwards' letter to petitioners stated that his action was in the "best interests of racing". This implied wrongdoing, and petitioners were never given an opportunity to deny it (R. 4, para. 12). His action was calculated to have the same effect on petitioners' ability to obtain employment elsewhere as that in *Greene* and *Meredith, supra.*

b. ***The rule of law adopted below to justify petitioners' arbitrary exclusion was not compatible with substantive due process of law***

The Circuit Court of Hancock County, in its opinion below, stated:

> "I, therefore, reluctantly rule, without regard to equities which may or may not be present on either or both of the sides of this controversy, that Waterford does have *the absolute common law right to exclude,* whether it be patron, rider or anyone else. The sole exception so far as the cases are involved would appear to be exclusion because of race, creed or color." App. A, *infra.* [emphasis added]

This rule of law is not compatible with substantive due process. The Circuit Court was under a duty to consider petitioners' rights under the federal Constitution and to weigh petitioners' Constitutional rights against the common law rights of Waterford Park, Inc. (Indeed, there was no reason for the stewards, the West Virginia Racing Commission or the West Virginia courts to assume that

petitioners were not excluded because of race, creed, color or national origin or because of their exercise of free speech, simply because no reason for exclusion was specified.)

Under the Constitution, a state may not interfere with a person's freedom to pursue his occupation without a rational justification for doing so. In *Schware* v. *Board of Bar Examiners of New Mexico,* 353 U.S. 232 (1957), this Court stated:

> "A State cannot exclude a person from the practice of law *or from any other occupation* in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness to practice law. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he failed to meet their standards or where their action is invidiously discriminatory." 353 U.S. at 238-239. [emphasis added; citations omitted]

This Court noted that one does not engage in one's profession merely as a matter of the State's grace:

> "We need not enter into a discussion of whether the practice of law is a 'right' or 'privilege'. Regardless of

how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace." 353 U.S. at 239 n.5 [citation omitted].

At the very minimum, there must be a showing of justification. In *Martin* v. *Monmouth Park Jockey Club*, 145 F.Supp. 439 (D.N.J. 1956), *aff'd mem.*, 242 F.2d 344 (3rd Cir. 1957), where federal Constitutional questions were not discussed, the record of the plaintiff jockey recited many violations of racing rules as well as several arrests and a prior ten year suspension for betting on a horse racing against the horse the jockey was riding. The United States District Court, without reference to the Constitution, decided that, in view of the jockey's record of bad conduct, there was sufficient justification for the exclusion. In the instant case, the petitioners' records are without blemish and there is no claim whatsoever that the exclusion was justified under state or federal law.

c. Petitioners were denied the equal protection of the laws

The act of the management of Waterford Park, Inc. in excluding petitioners from the race track, the act of the stewards in concurring, while at the same time refusing to intervene formally, the act of the West Virginia Racing Commission in refusing petitioners an administrative hearing and thus sustaining such exclusion, and the act of the Supreme Court of Appeals of West Virginia in rejecting petitioners' appeal each resulted in the denial to petitioners of the equal protection of the laws.

Waterford Park, Inc., with the concurrence of the stewards, barred Wilkerson, Applebee and Dalgo from its race track, but did not bar any other jockeys, thus, discriminating against these three. If there was no reasonable basis for this discrimination, petitioners were denied the equal protection of the laws. *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61 (1911). The record indicates that there was no reason; it was completely arbitrary.

In *Lindsley*, this Court laid down the following rules for determining whether or not a discriminatory act violated the equal protection clause:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is *without any reasonable basis and therefore is purely arbitrary.* 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." 220 U.S. at 78, 79. [emphasis added]

Here petitioners have carried that burden. It is difficult to imagine a more perverse discrimination than one for

which, as in this case, no reason is specified. Can it be possible that the most invidious and malicious discrimination can be shielded from the Constitution by silence?

Petitioners were the sole committeemen of Jockeys' Guild, Inc. at Waterford Park. As such, they represented other jockeys at the track who were members of the Guild for purposes of the Rules of Racing, Rule 186, App. B, *infra*. It is entirely possible that the action of Waterford Park, Inc. in discriminating against petitioners was, as pleaded, motivated solely by Edwards' animus toward the Guild and its vigilance, which represented a constant threat to his assumption of absolute power and dominion over everything and everyone at Waterford Park (including the representatives of the state). A classification based upon malice is most certainly an unreasonable basis for discrimination under the rules of *Lindsley*, but in any case the act of Waterford Park, Inc. was patently arbitrary and denied petitioners the equal protection of the laws.

Both the stewards and the West Virginia Racing Commission were agents of the State of West Virginia. Each denied petitioners any relief because no rules of racing had been violated. By this very admission, both conceded that petitioners' exclusion from Waterford Park was arbitrary. By refusing to act, they also denied petitioners the equal protection of the laws.

The courts of West Virginia, having been duly informed that Waterford Park had specified no reason for excluding petitioners and that the stewards and State Racing Commission had found no reason to exclude petitioners on their own motion, were bound to order Waterford Park, Inc., as a licensee of the State of West Virginia, to readmit

petitioners. In refusing to order Waterford Park, Inc. to do so, the courts of West Virginia themselves became parties to the discrimination and thereby denied petitioners the equal protection of the laws. *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Barrows* v. *Jackson,* 346 U.S. 249 (1953); *Edwards* v. *Habib,* 397 F.2d 687 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1016 (1969).

II.

The act of excluding petitioners from Waterford Park constituted "state action" by West Virginia within the ambit of the Fourteenth Amendment.

Petitioners respectfully submit that they are entitled to the protection of the Fourteenth Amendment to the Consitution since the act of excluding them from Waterford Park constituted "state action" by West Virginia.

a. *West Virginia's involvement in racing at Waterford Park was so pervasive as to establish a "nexus" between the two for purposes of the Fourteenth Amendment*

Waterford Park, Inc. was so extensively entwined with agencies of West Virginia, so closely regulated and supervised by that state and so utterly dependent upon the authority of the state for its existence and operations that its acts constituted "state action" by West Virginia within the ambit of the Fourteenth Amendment. As this Court recognized in *Evans* v. *Newton,* 382 U.S. 296 (1966),

> "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to

the constitutional limitations placed upon state action." 382 U.S. at 299 (1966)

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court held that racial discrimination at a lunch counter was "state action" and as such was prohibited by the Fourteenth Amendment. The only connection between the corporation operating the lunch counter and the State of Delaware was that the corporation leased space in a building owned and maintained by a state agency. The building had been built as a parking garage to alleviate traffic congestion in the city, and the agency leased space to the corporation in order to make the garage economically feasible. This remote connection was deemed sufficient to impute the discrimination of the Eagle Coffee Shop, the lessee, to the state. The Court said:

> "The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U.S. at 725.

Here, the "nexus" between the State of West Virginia and Waterford Park, Inc. was infinitely more discernible than the remote connection between the State of Delaware and the Eagle Coffee Shop in *Burton, supra.*

Thoroughbred horse racing in West Virginia is authorized by Articles 23 and 24 of Chapter 19 of the West Virginia Code.* These articles control every conceivable

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* All references to "Code Sections" in this petition are to the West Virginia Code, and the pertinent parts of all Code sections cited in this petition are set forth in Appendix B, *infra.*

aspect of such racing, as may be seen from the following sample provisions:

Code Section 19-23-1 — establishes a racing commission to regulate horse racing in the State.

Code Section 19-23-1 — provides that no person shall construct a race track without first receiving a permit.

Code Section 19-23-4 — requires a license from the state to conduct a race meeting at which racing is permitted for stakes.

Code Section 19-23-5 — provides how racing dates shall be fixed.

Code Section 19-23-6 — provides a procedure for suspending or revoking a license to conduct racing.

Code Section 19-23-7 — imposes a tax on pari-mutuel pools and race tracks.

Code Section 19-23-9 — restricts wagering to the pari-mutuel system.

Code section 19-23-10 — provides a criminal penalty for conducting a race meeting without a license.

Code Section 19-23-13 — provides for the licensing of jockeys.

Code Section 19-23-14 — provides for fixing the minimum number of races to be held on any racing day.

Waterford Park, Inc. had been duly licensed to conduct a race meeting, pursuant to Code Section 19-23-4, at the time petitioners were barred from its track. However, petitioners do not rely on the proposition that state action can be imputed from the issuance of this license alone. They base their assertion of state action on the high degree of regulation and supervision to which Waterford Park, Inc. was subject as a licensee.

In *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), this Court found that a sufficient nexus existed between a commission created by Congress to supervise transportation in the District of Columbia and a private bus company to justify imposing Constitutional restraints upon the bus company. The Court emphasized the extensive regulatory power of the Commission and stated:

> "In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the *regulatory supervision* of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress." 343 U.S. at 462 [emphasis added; footnotes omitted]

Thoroughbred horse racing in West Virginia is regulated by the West Virginia Racing Commission, Code Section 19-23-1. The Commission has been granted extremely broad powers. Indeed, the Supreme Court of Appeals of West

Virginia has construed Code Section 19-23-1 as bringing all persons connected with horse racing under commission control. *State ex rel. Spiker* v. *West Virginia Racing Commission*, 135 W.Va. 512, 63 S.E. 2d 831 (1951). This is so despite the fact that Code Section 19-23-15 directs the Racing Commission not to "interfere in the internal business or affairs of any licensee".

The Racing Commission in turn has adopted a comprehensive body of regulations, called the Rules of Racing, pursuant to the authority given it in Code Section 19-23-1.** These rules govern all races conducted by licensed racing associations, Rule 8. Under the rules, the Racing Commission can enter any place on the premises of Waterford Park, Rule 54. It prescribes the minimum number of races that Waterford Park, Inc. may conduct at its track each day during each licensed race meeting, Rule 60. It must approve the stakes offered by Waterford Park, Inc. for every race conducted during the meeting, Rule 56. It must approve the starting time of each race conducted by Waterford Park, Inc. and the time interval between races, Rule 61.

Waterford Park, Inc. must furnish the Racing Commission with a list of the names, addresses, duties and rates of compensation of all its officers and administrative personnel at least 30 days prior to the start of any race meeting, Rule 51. It must furnish the Racing Commission with a similar list covering all other employees of the race track at least 10 days before the meeting, Rule 51. It must furnish the Racing Commission with a copy of its payroll, Rule 278. It must notify the Racing Commission of the

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** All references to "Rules" in this petition are to the Rules of Racing (1966), and the pertinent parts of all Rules cited in this petition are set forth in Appendix B, *infra*.

discharge of any "official or employee, mutual or operative", Rule 52. It must inform the Racing Commission of any change in its stockholders or in the holdings of any particular stockholder, Rule 53.

The most cursory reading of the West Virginia Rules of Racing demonstrates that horse racing at Waterford Park is an industry regulated far more extensively than was the bus company in *Pollak, supra.* The Rules of Racing operate so as to make the conduct of a thoroughbred race meeting at Waterford Park, Inc. a *joint effort* of the State of West Virginia and the racing association. Under the Rules of Racing it is relatively easy to discern the function of track personnel, but it is unclear and perhaps unimportant whether their functions are being performed on behalf of the state or the track or both as joint venturers. Waterford Park, Inc. must pay the salary of a general inspector appointed by the State Racing Commission, Rule 297. The same is true of the patrol judges and the state veterinarian, Rules 302 and 317. In fact, Waterford Park, Inc. must pay the salaries of all employees of the Racing Commission assigned to its grounds, except one of the stewards, Rule 52. Waterford Park must furnish the State Racing Commission with a private office on its grounds, without compensation, Rule 55. At the bare minimum, these "government officers" can be said to be acting jointly with a private person, Waterford Park, Inc. This fact alone justifies a finding that the arbitrary act of Waterford Park in excluding petitioners without notice, hearing or specified reason constitutes "state action". *United States* v. *Price,* 383 U.S. 787 (1964).

The role of the stewards in particular demonstrates that races at the track are conducted jointly by West

Virginia and Waterford Park, Inc. The stewards supervise all aspects of racing at the track, Rules 279 through 296. There are three such stewards: one appointed by Waterford Park, Inc.; the second by the Racing Commission; and the third by the other two, Rule 279. While the stewards are unquestionably agents of the State of West Virginia, it is pertinent that all three officially correspond on stationery bearing the letterhead of Waterford Park, Inc. The salaries of two of the three stewards are fixed and paid by Waterford Park, Inc. Significantly these two stewards were represented in the state courts below by counsel for Waterford Park, Inc. In reality, the stewards are simply Waterford Park, Inc. acting under color of authority of West Virginia.

That horse racing at Waterford Park is in effect a joint venture between Waterford Park, Inc. and the state is even more clear when the financial aspects are scrutinized. Out of the 15% deducted from the pari-mutuel pool at each race conducted at Waterford Park during 1968, 9¼% was paid to Waterford Park, Inc. and 5¾% to West Virginia. During 1968, West Virginia derived $4,374,735 from operations at Waterford Park.[1] This was 48.4% of West Virginia's total racing revenue ($9,031,358).[2] What West Virginia collected, therefore, was not a tax in substance; it was the proceeds of a joint venture.

Lower courts, following *Burton, supra,* have recognized that the mere fact that a private corporation is involved

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[1] Annual Report of the West Virginia Racing Commission to the Governor of the State of West Virginia for 1968, 5, January 15, 1969.

[2] *Id.*

is of no consequence, especially when competing Constitutional rights of individuals are presented and there has been a showing of an interrelationship between the corporation and the state. *Farmer* v. *Moses,* 232 F.Supp. 154 (S.D.N.Y. 1964); *Louisiana High School Athletic Ass'n* v. *St. Augustine High School,* 396 F.2d 224 (5th Cir. 1968). In *Farmer,* the question was whether the New York World's Fair Corporation, which had been organized as a private membership corporation, was sufficiently linked to the State of New York so that it had to comply with the Fourteenth Amendment. The District Court concluded that it would be "sophistry" to argue that the Fair was a completely private venture. It held that the act of the corporation in preventing the plaintiffs from disseminating handbills on the Fair grounds constituted state action violating the Constitution.

Here we have a situation where the State of West Virginia was just about as deeply involved in a business activity as a state can be. Its legislature had provided that this business could only be conducted pursuant to a license and had established a Commission to regulate the licensees. That Commission had adopted exhaustive substantive and procedural rules regulating every aspect of the business. Under these rules, the stewards were charged with the duty of investigating complaints against jockeys and, if justified, of "ruling them off the track", Rules 88, 89 and 90.

Despite this established procedure, Waterford Park summarily excluded petitioners from the race track, without a hearing, without even a reason. Though concurring in this arbitrary action, the resident stewards refused to act formally; the Racing Commission refused to act; the courts

refused to act; and a private corporation was left wielding the full power of its joint venturer, the State of West Virginia, to "rule" petitioners off the track. No act by Waterford Park, Inc. could more clearly have constituted "state action" by West Virginia for purposes of the Fourteenth Amendment.

b. The actions of the stewards, the West Virginia Racing Commission and the West Virginia courts themselves constituted "state action" for purposes of the Fourteenth Amendment.

Once petitioners had been excluded from Waterford Park, the Board of Stewards still had the power to determine if their exclusion was proper, Rule 280. The West Virginia Racing Commission had the power, under its own rules, to conduct a hearing with respect to any discontinuance of a jockey's employment or engagements, Rule 50. Thus either could have conducted a hearing into why petitioners were being excluded from Waterford Park on its own motion, whether or not petitioners had requested a hearing and whether or not it believed a rule of racing had been violated.

If the Racing Commission found, at a hearing, that Waterford Park, Inc. had acted unreasonably and arbitrarily in barring petitioners, it had the power to order them readmitted. If Waterford Park, Inc. thereafter refused to readmit petitioners, the Racing Commission had the power to order its license revoked, Rules 50, 171. Presumably the only reason the Racing Commission did not conduct a hearing was that it knew that Waterford Park, Inc. had no legitimate reason for barring petitioners from its track, and it preferred to look the other way.

Even if no "nexus" had existed between the State of West Virginia and Waterford Park, Inc., this independent refusal to act formally by the stewards and the State Racing Commission itself constituted "state action". State action, for purposes of the Fourteenth Amendment, can take the form of "negative state action"—that is, the failure to act. *Baker* v. *Carr*, 369 U.S. 186 (1962). In *Huey* v. *Barloga*, 277 F.Supp. 864 (N.D. Ill. 1967), the District Court recognized that the neglect of state officials to enforce the rights of oppressed persons constituted state action for purposes of the Fourteenth Amendment. In *United States* v. *U. S. Klans, Knights of the Ku Klux Klan, Inc.*, 194 F.Supp. 897 (M.D. Ala. 1961), the District Court held that the failure of law enforcement officers to enforce the law constituted state action for like purposes.

Likewise, the refusal of the Circuit Court of Hancock County and the Supreme Court of Appeals of West Virginia to enjoin Waterford Park, Inc. from barring petitioners from the track constituted "state action" for purposes of the Fourteenth Amendment, independent of any "nexus" between the State of West Virginia and Waterford Park, Inc. *Barrows* v. *Jackson, supra. Shelley* v. *Kraemer, supra.*

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court held that a state court's judgment against a newspaper in a libel suit abridged the newspaper's right of free expression under the First Amendment, as made applicable to the states by the Fourteenth Amendment. The suit had not been initiated by the state; it was a suit between private litigants, but the decision of the court itself was held to constitute state action for purposes of the Fourteenth Amendment. See also *Common-*

wealth of Pennsylvania v. *Brown*, 392 F.2d 120 (3rd Cir. 1968), *cert. denied*, 391 U.S. 921 (1968), and *Edwards* v. *Habib, supra.*

Thus, the action of Waterford Park, Inc. and the stewards in barring petitioners from the track, compounded by the refusal of the West Virginia Racing Commission to grant a hearing and the refusal of the West Virginia courts to grant injunctive relief, have resulted in a complete denial by West Virginia of each and every right of petitioners to procedural and substantive due process of law and to the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia and consider the constitutional questions of substance involved therein.

Respectfully submitted,

JACKSON, NASH, BROPHY,
BARRINGER & BROOKS
Attorneys for Petitioners
330 Madison Avenue
New York, New York 10017

Of Counsel
WILLIAMSON PELL, JR.
ROGER D. SMITH
LAWRENCE P. MCGAULEY
ROBERT W. CINQUE

August, 1969

APPENDIX A

Memorandum Opinion of the Circuit Court of Hancock County, West Virginia

IN THE
CIRCUIT COURT OF HANCOCK COUNTY,
WEST VIRGINIA

Civil Action No. 3972

ROBERT WILKERSON,

Plaintiff,

—VS.—

WATERFORD PARK, INC., *et als.,*

Defendants.

Civil Action No. 3973

RUSSELL APPLEBEE,

Plaintiff,

—VS.—

WATERFORD PARK, INC., *et als.,*

Defendants.

Civil Action No. 3974

MILTON J. DALGO,

Plaintiff,

—VS.—

WATERFORD PARK, INC., *et als.,*

Defendants.

MEMORANDUM

Three separate civil actions asking for preliminary injunction and other equitable relief have been brought by three professional jockeys, Robert Wilkerson, Russell Applebee and Milton J. Dalgo, against Waterford Park, Inc. and Carlyle Johnson, Steward; Jay Eyster, Steward; and Joseph P. Brocator, Steward. These actions are numbered respectively Civil Action Nos. 3972, 3973 and 3974.

Plaintiffs seek a mandatory injunction requiring Waterford Park, Inc., a West Virginia corporation, to permit them to ply their trade on defendant, Waterford Park's, premises. The stewards were joined as defendants under the theory that they concurred in Waterford's action in refusing to permit these three riders from coming on Waterford's premises.

Certain reasons have been advanced by these three riders in argument and brief for Waterford's action in refusing to admit them to Waterford's track. No rulings of any nature whatsoever have been made against these three riders by the Board of Stewards.

These three riders appealed to the West Virginia Racing Commission but were turned down on the theory that there was nothing for the West Virginia Racing Commission to review inasmuch as the Board of Stewards had made no rulings against them.

Waterford Park, by its President, James F. Edwards, in writing dated May 2, 1968, notified the plaintiffs that their privileges to enter or remain on the grounds at Waterford were being withdrawn seven days from the receipt of that notice. No reasons for Waterford's action were given, and it is the contention of the defendant, Waterford Park, that no reasons are needed to justify this action, because Waterford has the absolute right at common law to prevent

whomsoever it pleases for any reasons whatsoever, or for no reason whatsoever, to enter upon Waterford property.

Motions to Dismiss have been filed separately by Waterford and by the three stewards.

On two separate occasions time was set aside by the Court to permit the taking of whatever testimony either or both of the sides to this controversy desired to present; but, when the issue became plain that Waterford Park, insofar as the injunctive aspect of this action is concerned, relies absolutely on an alleged "absolute common law right to exclude," counsel agreed to a stipulation, which, in effect, obviated the necessity for taking testimony. This stipulation is as follows:

> "For the purpose of these particular proceedings, the Court has suggested that the parties agree that the injunction portion of these actions shall be severed for the purpose of rulings on the sole issue of whether or not there is an absolute common law right to exclude the plaintiffs from defendant Waterford Park Race Track, from any subsidiary issue of damages.
>
> It is further understood, however, that in the event the plaintiffs secure a favorable ruling upon their prayer for injunction, that the defendant Waterford Park shall not be precluded from the use of any proper defense, if any, that it may have to a claim for damages."

The Court, therefore, is treating the Motions to Dismiss as demurrers and is assuming all facts well pleaded in the Complaints filed to be true.

This ruling, so far as Waterford Park is concerned, is therefore based on the resolution of one issue, and one

issue alone, and that issue is—Does Waterford have an absolute common law right to forbid entry by these three plaintiffs to its grounds?

Extensive briefs have been filed by the parties.

Before proceeding to consider this sole issue as to Waterford, the Motions to Dismiss of the three stewards will be taken up. Their motion is, in effect, based upon the statutory provision contained in Chapter 53, Article 1, Section 2 of the West Virginia Code as to venue.

There can be little doubt that the stewards as a board are an agency of the West Virginia Racing Commission regardless by whom they are appointed or by whom paid. It is this Court's opinion, therefore, that venue against them is improperly laid in Hancock County, and their Motions to Dismiss will be granted.

Waterford Park argues that this Court lacks jurisdiction of the person of Waterford. In this Court's opinion, this contention cannot be sustained, and it is this Court's ruling that it does have jurisdiction of Waterford Park in this sense.

We then come to the important issue in this action. This Court is not unmindful of the predicament in which these plaintiffs find themselves. They are professionals—there can be no question. Their being, in effect, ruled off by Waterford, it must be assumed, does affect their ability to earn a living. The West Virginia Racing Commission by inaction gives them nowhere to turn except to a Court of Equity. This is not meant to be a reflection upon the Board of Stewards or the West Virginia Racing Commission in light of the West Virginia Statute, which forbids the Commission or its agent, from interferring in the internal affairs of a racing association. The wisdom of such

a statute is not an issue here. This Court is well aware of the factual background leading to its adoption.

The law would seem to be settled that a race track does have the right to exclude from the course whomsoever it pleases for whatsoever reason. This would apply equally to patrons and to jockeys—*Martin* v. *Monmouth Park Jockey Club,* 145 Fed. Supp. 439. Plaintiffs seek to distinguish this case on the basis that the jockey there involved was an unsavory character and thus defendant was justified in excluding him. There the jockey's record recited many violations of riding rules, as well as several arrests. We apparently do not have this so far as these three plaintiffs are concerned.

It would appear that it is settled law that a race track does have the right to exclude both jockeys and patrons at will. The case of *Garifine* v. *Monmouth Park Jockey Club,* 148 At. 2nd 1, 29 N.J. 47 reviews practically all of the cases on this particular subject. A reading of these cases show that the arguments used by the plaintiffs in these three cases have been advanced many times. The courts in an almost unbroken line of decisions have rejected these contentions. It is true that there is no West Virginia ruling on this issue. This Court, however, is a nisi prius court and is bound as a matter of policy to follow the settled law of this country, unless it is in conflict with higher authority in this State. I, therefore, reluctantly rule, without regard to equities which may or may not be present on either or both of the sides of this controversy, that Waterford does have the absolute common law right to exclude, whether it be patron, rider or anyone else. The sole exception so far as the cases are involved would appear to be exclusion because of race, creed or color.

Orders may be submitted in conformity with this Memorandum, savings plaintiffs' exceptions thereto. As this is a novel question so far as West Virginia is concerned, I anticipate an appeal from this holding. Counsel's attention is called to several papers contained in the file, which are not properly of record, which it might be well to make part of the record, if it is possible, in the event of an appeal.

JAMES G. MULLEN
Judge

Letter Opinion of the West Virginia Racing Commission Below

(Letterhead of West Virginia Racing Commission)

May 17, 1968

Mr. Donald R. Donell
Attorney at Law
Longo Building
Weirton, West Virginia 26062

Dear Mr. Donell:

Your petition requesting a hearing before this Commission, on behalf of certain named Jockeys at Waterford Park, Inc., has been thoroughly reviewed.

Following due consideration, the Commission respectfully rules as follows:

> In the matter of Robert Wilkerson, Milton Dalgo and Russell Applebee, there are no Steward rulings upon which an appeal to this Commission can be made.
>
> Although your petition alleges action on the part of the Stewards in the case of Ray Cooper, the Commission has not received such ruling and information indicates that there is no such ruling pending.

Since there are no rulings against the named subjects and therefore, no apparent violation of the rules and regulations of this Commission, you are hereby advised that

your request for hearings on behalf of the named Jockeys is denied.

Further, it would appear that the relief sought by your petition is not within the jurisdiction of this Commission.

Very truly yours,

Joseph P. Condry
Chairman

C:r

APPENDIX B

Constitutional, Statutory and Regulatory Provisions Involved

CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE, TITLE 28

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Article 23.

Horse Racing.

§ 19-23-1. Racing commission established; meetings; report to governor; number and terms of members; powers and duties.

There is hereby created the West Virginia racing commission, which shall be a corporation and, as such, may contract and be contracted with, sue and be sued, and shall have a corporate seal. Said commission shall have its principal office in the State capitol at Charleston, and shall meet annually at its office in the month of January, and at such other times and places as shall be designated by its chairman. It shall also make and publish annually a report to the governor of the business transacted by it.

The commission shall consist of three members, all of whom shall be actual and bona fide residents of this State and not more than two of whom shall at any one time belong to the same political party. They shall be appointed by the governor by and with the advice and consent of the senate. The term of office of the members of such commission shall be four years, except that of the first appointees, one shall be appointed for two years, one for three years and one for four years, and their appointments shall be made within twenty days after this bill shall become effective, and their successors shall thereafter be appointed for terms of four years each. No person not a bona fide member of the commission shall vote upon or participate in the deliberations of the commission on any matter which may come before it. Said commission shall

have all the powers necessary to carry out fully and effectively all the purposes of this article, and shall have the power to prescribe reasonable regulations under which all races shall be conducted within the State of West Virginia except as hereinafter provided. The commission may at any time, for the violation of any such regulation, or for any fraudulent practices, require the removal of any racing official or racing employee employed by any licensee licensed hereunder; and shall have power to summon witnesses and to administer oaths or affirmations to such witnesses and take testimony whenever in the judgment of said commission it may be necessary for the discharge of its duties. False swearing on the part of any witness shall be deemed perjury and shall be punished as such.

. . . .

§ 19–23–4. License required where horse racing for stake, purse or reward.

No person shall hereafter hold or conduct any horse race meeting within the State of West Virginia whereat horse racing shall be permitted for any stake, purse or reward except under the license of the West Virginia racing commission. . . .

§ 19–23–5. Application for license; determination of racing dates; refusal of application; review.

Any person desiring to conduct a horse race meeting within the State of West Virginia to permit or conduct pari-mutuel pools shall apply to the West Virginia racing commission for a license to do so. . . .

. . . .

In fixing dates for race meetings at the various tracks in this State the commission shall consider the racing circuits with which the race tracks in this State are associated, or contiguous to, and shall also consider dates which are calculated to increase the tax revenues accruing from racing.

. . . .

§ 19–23–6. Procedure for suspension or revocation of license.

The commission shall not suspend or revoke a license until after a hearing has been held in the county wherein the licensee is or has been conducting race meetings. Notice of such hearing shall be served on the licensee at least ten days prior to the hearing. Such notice shall set forth the reasons for such proposed suspension or revocation and be served in the manner set forth in this Code for the service of a summons. Appeal from the decision of the commission shall lie in the circuit court of the county wherein such hearing is held, with the right of appeal to the supreme court of appeals in the manner provided by law.

§ 19–23–7. Per diem tax on tracks; tax on pool contributions; how taxes paid; financial responsibility of licensees; contents of licenses.

Any person operating thoroughbred or running type racing at any horse race track one mile or more in length shall pay each day upon which horse races are run, a license tax of five hundred dollars; any race track less than one mile in length shall pay for each day upon which horse races are run a license tax of two hundred fifty dollars;

Provided, that the per diem tax shall not apply to horse shows or county fairs at which racing is conducted for not more than six days. Any person licensed by the commission to conduct thoroughbred or running type racing and to permit and conduct pari-mutuel wagering under this article shall, in addition to the aforementioned tax, pay to the racing commission of the State of West Virginia a tax of five and three fourths per cent of the total contribution to all pari-mutuel pools conducted or made at any and every race meeting licensed under this article. Such payments shall be made to the commission or its agent after the last race of each day and every day of each and every race meeting, and shall be made from all contributions to all pari-mutuel pools to each and every race of the day, which payment shall be deposited with the treasurer of the State of West Virginia to the credit of the general revenue fund: Provided, however, that a person operating any duly licensed horse race track, having an average daily pari-mutuel pool of one hundred fifty thousand dollars or less, per day, for the licensed race meetings, of the preceding calendar year, shall, in lieu of payment of the five and three fourths per cent tax, paid to the State, from pari-mutuel pools, as above provided, be permitted to conduct pari-mutuel wagering at such horse race track, under this article, on the basis of a daily tax which is fixed as follows: On a daily mutuel pool not exceeding one hundred fifty thousand dollars the daily tax shall be four thousand dollars plus five and three fourths per cent of the daily mutuel pool, if any, in excess of one hundred fifty thousand dollars.

. . . .

. . . .

§ 19–23–9. Only pari-mutuel system of wagering permitted; commission of licensee on pari-mutuel pools; minors; auditor.

A person licensed by the commission shall permit only the pari-mutuel system of wagering within the enclosure at which horse racing is held, and the commission deducted by any thoroughbred or running horse race licensee from the said pari-mutuel pools shall not exceed fifteen per cent of the total pari-mutuel pools for the day, including the license fee of the gross amount handled hereinbefore provided for, plus the breakage, which shall be made and calculated to the dime. Such breakage shall be retained by the licensee.

. . . .

§ 19–23–10. Aiding or abetting in conduct of race meet without license; penalty.

Any person aiding or abetting in the conduct of any meeting in the State of West Virginia at which racing and wagering on the same is permitted, without a license duly issued, not suspended or revoked and unappealed from by the commission, shall be guilty of a misdemeanor, ...

. . . .

§ 19–23–13. Licenses for jockeys, etc.; relief fund; restrictions on persons employed; penalties.

The commission may license jockeys, apprentice jockeys, exercise boys, owners, trainers, grooms, platers, stable foremen, valets, veterinarians, authorized agents, jockeys' agents, mutual employees, and such other categories employed on a race track as the commission may deem proper; and may charge a fee therefor. The commission may also

register colors and assumed names, and may charge a fee therefor. . . .

At least eighty per cent of the persons employed by a person licensed to operate a race track or racing meeting shall be citizens and residents of the State and shall have been such citizens and residents for at least one year immediately prior to such employment. . . .

. . . . .

§ 19–23–14. Number of races daily.

The commission shall fix a minimum but not a maximum number of races to be held on any respective racing day.

§ 19–23–15. Internal affairs and business of licensee.

The commission shall not interfere in the internal business or affairs of any licensee.

. . . .

Article 24.

Race Tracks.

§ 19–24–1. Race track construction permits; application therefor; action by racing commission; review.

No person, after the date on which this article becomes effective [June 5, 1953], shall construct a race track where horse race meetings are to be held and the pari-mutuel system of wagering conducted, as provided in article twenty-three [§ 19-23-1 et seq.] of this chapter, unless and until such person shall first have applied for and obtained from the West Virginia racing commission a construction permit which may be issued by said commission in strict accordance with the provisions of this article, and not otherwise. . . .

. . . .

RULES OF RACING

1966

West Virginia Racing Commission

* * * * *

8. These rules govern all races run over the courses of the Associations licensed by the West Virginia Racing Commission.

* * * * *

50. The West Virginia Racing Commission, recognizing the necessity of the obligations of a Racing Association to comply with its requirements under the license granted it by the West Virginia Racing Commission, under the authority of the State of West Virginia, and fulfilling its obligations to the public and the State of West Virginia with the best possible uninterrupted services, in its comparatively short licensed period, herein, provides that all Racing Associations, officials, horsemen, owners, trainers, jockeys, grooms, platers and all licensees, who have accepted directly or indirectly, with reasonable advance notice the conditions under which said Racing Association engages and plans to conduct such race meeting, shall be bound thereby. Any such Racing Association, officials, horsemen, owners, trainers, jockeys, grooms, platers and all licensees who so accept such conditions with reasonable advance notice thereof, shall before they terminate or discontinue their employment, engagements or activities under such accepted conditions, give the West Virginia Racing Commission and the respective Racing Associations with whom they are engaged, at least seven (7) days' notice in writing of their intentions to terminate or discontinue their employment, engagements or activities under

such accepted conditions. The said Commission may upon notice to all parties of interest conduct a hearing or hearings with respect to such, or any termination or discontinuance of employment, engagements or accepted conditions, and if the said Commission shall find that the causes for the said termination or discontinuance of employment, engagements or activities under such accepted conditions are unreasonable or unlawful or contrary to the rules, regulations and conditions of the West Virginia Racing Commission or the statutes of the State of West Virginia, or in bad faith or detrimental to the public interest of against the best interest of horse racing, or if the said Commission shall find that the licensees or said persons have failed to give the required written notice provided, or in any other manner violated this rule, it may in its discretion revoke, cancel, withdraw or suspend the licenses of any such Racing Association, official, horseman, owner, trainer, jockey, groom, plater and other licensee, or may forever bar said person or persons from engaging in any activities at any race track in the State of West Virginia.

If, however, the said Commission shall find that the causes for the said termination or discontinuance of said employment, engagements or activities under such accepted conditions are reasonable, lawful, in good faith, not contrary to the rules, regulations and conditions of the West Virginia Racing Commission and the statutes of the State of West Virginia and not detrimental to the public interest or the best interest of horse racing, then said termination or discontinuance of employment, engagements, or activities under such accepted conditions shall not be grounds for suspension, cancellation or revocation of the licenses of said persons, and the Commission shall so advise all parties in interest and shall use its best efforts to settle any disputes by the between said parties.

51. All Associations granted a license from this Commission shall, at least thirty (30) days before each meeting, submit the names of the officers and a complete list of administrative personnel, showing addresses, duties, and compensations; and, at least ten (10) days prior to the start of each meeting, submit a complete list of employees, with addresses, duties, and compensations. All additions or changes in the above personnel must be promptly reported to the Commission for its approval. An Association failing to furnish such required information may be fined Two Hundred and Fifty Dollars ($250.00) for each day in violation.

(a) The Commission may require an examination for vision and hearing, by a doctor designated by the Commission, before approving any racing official.

52. If any official or employee, mutual or operative, be discharged by the Association, a full report of the reason for discharge shall be made to the Commission.

53. Imposed upon the secretaries of the different Associations conducting racing in West Virginia is a duty of informing the Commission of any change in the personnel of the stockholders or in the holdings of any individual stockholder of the Association for which he is the secretary.

54. The Commission and as it designates to its representatives shall have the right of full and complete entry to any and all points of the grounds of the Association licensed to conduct horse racing in West Virginia.

55. Each Association granted license for a race meeting in West Virginia shall supply the West Virginia Racing Commission with a suitable private office to conduct the business of the Commission.

Excepting the salary of the Stewards representing the Commission, the Auditor of Pari-Mutuels and the License Clerks, the Association shall pay the officials and employees appointed by the Commission and assigned to duty on the grounds of said Association.

56. Each Association conducting races on any tracks shall, before publishing, submit to the Commission the conditions for all races its proposes to hold, together with the stake, purse, or reward, all of which shall be subject to the approval of the Commission. All proposed purses shall be exclusive of any entrance or starting fees that may be charged. The minimum purse given by Racing Associations shall be $1,000.00.

* * * * *

60. The minimum number of races per day at all race tracks under supervision of the West Virginia Racing Commission shall be eight (8).

61. Post time for the first race at each meeting under the supervision of the West Virginia Racing Commission, shall first be approved by the Commission, and each race thereafter shall be run at intervals to be approved by the Commission, unless an emergency arises, and in that event the final decision shall be in the hands of the Steward representing the Commission.

* * * * *

88. Anyone guilty of making a handbook on the grounds of any Association licensed by the Commission, shall be ejected from the ground and denied further admission thereto, and any owner, jockey or other person interested in any horse or horses at said meeting who shall be guilty of betting with or through any such handbook, shall be ejected from the grounds or denied admission by order of the Stewards.

89. If any trainer, jockey, stable employee, or other person solicits bets from the public by correspondence or other methods, to be made on the horses in any stable, such person or persons so offending shall be ruled off the course or denied admission by order of the Stewards.

90. Every person or horse expelled or ruled off by any recognized turf authority for corrupt, fraudulent or improper practice or conduct, shall stand ruled off the courses licensed by the West Virginia Racing Commission.

* * * * *

LICENSES

171. Any license issued by the West Virginia Racing Commission may be revoked on account of corrupt, fraudulent, or improper practice or conduct detrimental to racing on the part of the licensee, by a proceeding before the West Virginia Racing Commission. Rules governing such hearings are as follows:

(a) Said hearings shall be held at the office of West Virginia Racing Commission in Charleston, West Virginia, or at such other place as may be designated in writing by said West Virginia Racing Commission.

(b) Citations for hearings must be issued not less than five (5) nor more than thirty (30) days before the date of the hearing, and such citation shall contain full statements of the charges preferred against the licensee or any other person accused of corrupt, fraudulent, or improper practice.

(c) No citation shall be issued except upon prima facie showing of a violation of the rules or a showing of corrupt, fraudulent, or improper practice on the part of the licensee, or his agent or servant or employee or owner, or upon written complaint of some person of such wrongdoing on the part of the licensee or his agent or servant or employee or owner.

(d) The original of the report of findings of the investigation or complaint by other persons shall be filed with the West Virginia Racing Commission.

(e) The West Virginia Racing Commission holding the hearing shall immediately take the case under advisement, and shall within a reasonable period of time after the hearing make its findings; and, should its findings be to the effect that the licensee or any other person subject to the investigation had been guilty of corrupt, fraudulent, or improper conduct or violation of the rules, the Chief Clerk will at once so notify the licensee or any other person subject to such findings, and a copy of said findings shall be forwarded by registered mail to the last known address of the licensee, or the person who was subject to the investigation.

* * * * *

186. Whenever track conditions are such that jockeys feel they cannot ride over it, the duly appointed representative of the jockeys shall report the matter to the Stewards.

* * * * *

278. The Auditor of Pari-Mutuels shall be afforded every facility for performing all the duties that may be assigned to him by the Commission, including the following:

1. Every Association licensed by the Commission shall furnish the West Virginia Racing Commission copies of their first payroll and any other that might be requested, both mutuel and operative and covering all employees performing services during any race meeting.

2. Carbon copies of all mutuel work sheets are to be turned over to the Auditor of Pari-Mutuels immediately after each race.

3. At the end of each race day, a consolidated report showing detailed figures of the mutuel handle, commission or take and breaks shall be handed to the Auditor of Pari-Mutuels.

4. At the end of each day, every signed complaint made by any customer, with reference to transactions with sellers or cashiers, shall be reported on printed blanks and furnished to the Auditor of Pari-Mutuels.

5. A written report shall be furnished by the manager of the money room of all errors made by the mutuel sellers or cashiers, commonly called "shorts or overs". Such reports shall detail the name of the seller or cashier, his working place, the name of the money room checker discovering the error and the amount involved.

The Stewards

279. There shall be three Stewards for each race meeting. One of the Stewards for each race meeting shall be named by the Commission. The Association holding the meeting shall name the second Steward; and the two Stewards so selected shall name the third. In the event of a disagreement between the two Stewards in naming the third Steward, it shall then become the duty of the West Virginia Racing Commission to make the third appointment. In the event a Steward is temporarily incapacitated or for some sufficient reason cannot serve, he may deputize someone to serve for him in his absence. The name of such deputized person shall be submitted to the Commission for approval as soon as practicable.

All other officials herein designated shall be appointed by the Association holding the meeting, with the exception of one patrol judge, a general inspector, auditor of parimutuels, a license clerk, and the State Veterinarian. All the appointments, including the Stewards, are subject to the approval of the West Virginia Racing Commission, which reserves the right to demand a change of personnel for what it deems good and sufficient reason, the successor to the official so replaced to be subject to the approval of the Commission.

280. The Stewards shall determine all questions arising in reference to racing at the meeting and shall have authority to postpone races. They shall take cognizance of all infractions of the rules and may fine offenders not exceeding Two Hundred and Fifty Dollars ($250.00) suspend, or rule off.

281. The Stewards shall take notice of corrupt riding and other questionable transactions on the turf. Complaint thereof can be made by an owner, trainer or jockey participating in the race or any official representing the Association on the Racing Commission, but in the failure of the complainant to substantiate the charge, he may be fined, suspended or ruled off.

282. The Stewards shall have power to call on any person in whose name a horse is entered to produce proof that the horse entered is not the property either wholly or in part, of any person who is disqualified, or to produce proof of the extent of his interest or property in the horse, and in default of such proof being given to their satisfaction, may declare the horse out of the race.

283. In their discretion, where fraud is suspected, the Stewards shall have the right to put upon a horse a rider selected by them, and to place the horse in charge of a trainer they may select. Any owner or trainer who refuses to permit a rider or trainer to be changed as herein provided, and any trainer or rider who refuses to take charge of or ride a horse on the order of the Stewards shall be ruled off.

284. The Stewards shall have the power at any time to order an examination, by such person or persons as they deem fit, of any horse entered in a race or which has run in the race.

285. It shall be the duty of one or more of the Stewards to be in daily attendance at the office of the Racing Secretary at a time not later than ten (10) minutes before scratch time and to remain until closing of entries.

286. The Stewards shall, not later than seven (7) days after the end of each meeting, make report in writing to the Chairman of the Racing Commission of all infractions of the rules and of the rulings of the Stewards upon matters coming before them during such meeting. Copies thereof shall be mailed to each member of the Commission.

287. The Stewards shall have power to suspend or exclude from the stands and grounds improper and objectionable characters and persons who have been ruled off for corrupt practices on the turf in any country.

288. Any person who is under suspension at other race tracks shall be denied the privilege of the grounds at any race track in West Virginia.

289. The Stewards shall have a discretionary power to warn any person off the premises of the Association, and, in case of such notices being disregarded, to enforce them by proper orders.

290. No person under the age of twenty-one (21) years shall be permitted to wager on any horse or horses on any track licensed by this Racing Commission.

291. If any owner, trainer, jockey, attendant, or any person uses improper language to the racing officials, or if any person be guilty of using profane or indecent language, carrying or exhibiting a deadly weapon, or otherwise disturbing the peace on any race track enclosure, he shall be either fined, suspended, or ruled off.

292. Craps and other species of gambling games played by trainers, jockeys, attendants, or any other persons are

positively forbidden about the stables and grounds of the various associations governed by these rules. The person so offending may be suspended or ruled off.

293. Jockeys, grooms and stable boys are positively forbidden to loiter in the betting enclosure. Those who violate this rule may be fined, suspended, or ruled off.

294. During the term of suspension of any jockey, owner, trainer or other person on any race track in West Virginia under the jurisdiction of this Commission, his badge shall be taken up and he be refused admission to any part of the course; provided that a suspended jockey may be permitted to gallop or exercise horses during the morning hours and to lodge in the course at night.

295. Any person or persons who shall, knowingly, take over to break, train or race, any horse or horses, belonging to or under the supervision, management or control of any person, or persons who stand suspended from the turf may, themselves, be fined or suspended.

296. Where there is no penalty specified for a violation of the racing rules or the regulation of the course, the Stewards shall have the power to fine, suspend, expel from, or rule off the course; and where power is given under these rules to fine, but no maximum amount of such fine is fixed, the Stewards may fine not exceeding Two Hundred Fifty Dollars ($250.00). If any case occurs which is not, or which is alleged not to be provided for by these rules, it shall be determined by the Stewards in such manner as they may think just and conformable to the usage of the turf.

General Inspector

297. The Commission shall appoint an official designated as "General Inspector" whose salary shall be set by the Commission at not less than twenty ($20.00) per day, and shall be paid by the Association. The General Inspector shall have such duties as are assigned to him by the Commission from time to time or by the Steward representing the Commission. All reports shall be made to the Steward.

* * * * *

Patrol Judges

302. The Commission shall appoint an official designated as a "Patrol Judge", whose station on the track shall be designated by the Steward representing the Commission, and shall be subject to the orders of the State Steward. The Association shall pay the State Patrol Judge the same salary paid by it to Patrol Judges appointed by it.

* * * * *

State Veterinarian

317. There shall be two Veterinarians for each race meeting. One Veterinarian shall be named by the Commission, and the Association holding the meeting shall name the other Veterinarian. Their salaries shall be approved by the Commission and paid by the Association. The Veterinarians shall perform the following duties:

Make daily pre-race examinations to determine and approve the fitness of each horse to race.

Be present in the paddock to inspect all horses before each race, and inspect or observe all horses after the finish of the race.

Be present at the starting gate to determine fitness of any injured or otherwise incapacitated horses before the start of each race.

Examine and approve horses that have been retired from racing for a period of six months, in conformity with Rule No. 167.

Supervise and collect saliva, urine, or secretions used in making pre-race or post-race analyses.

APPENDIX C

Petition to Supreme Court of Appeals of West Virginia for Writ of Error

IN THE

CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

Civil Action No. 3972

ROBERT WILKERSON,

Plaintiff,

vs.

WATERFORD PARK, INC., et al.,

Defendants.

Civil Action No. 3973

RUSSELL APPLEBEE,

Plaintiff,

vs.

WATERFORD PARK, INC., et al.,

Defendants.

Civil Action No. 3974

MILTON J. DALGO,

Plaintiff,

vs.

WATERFORD PARK, INC., et al.,

Defendants.

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of West Virginia:

Your Petitioners, ROBERT WILKERSON, RUSSELL APPLEBEE, and MILTON J. DALGO, respectfully represent unto your Honors that they are aggrieved by a final judgment rendered against them, entered in the Circuit Court of Hancock County, West Virginia, on the 15th day of July, 1968.

PROCEEDINGS

Your Petitioners instituted individual Civil Actions in the Circuit Court of said County which thereafter came on for a hearing upon the Motions to Dismiss of the defendants. Waterford Park, Inc., a Corporation, Chester, West Virginia, Carlyle Johnson, Steward, Waterford Park Racetrack, Chester, West Virginia, Jay Eyster, Steward, Waterford Park Racetrack, Chester, West Virginia, and Joseph P. Brocator, Steward, Waterford Park Racetrack, Chester, West Virginia. The Court thereupon granted a consolidation of the aforesaid causes of action and said cases came on to be heard on the 17th day of June, 1968, upon the verified "Complaint"; upon the Motions to Dismiss filed by the defendants; and upon oral arguments of counsel. Thereafter, the Court granted leave to counsel for the respective parties to file briefs in support of their respective contentions whereupon briefs and supplemental briefs were submitted by the respective parties. The Court thereupon took the aforesaid motions under advisement and, by its Memorandum of Opinion under date of the 5th day of July, 1968, sustained the motions of the defendants to dismiss the complaints of the plaintiffs, to which action

of the Court your Petitioners objected and excepted; all of which more fully appears from the order entered by the Court on the 15th day of July, 1968.

And now your Petitioners present this Petition to this Honorable Court setting forth all the proceedings had herein.

Statement of Facts

Your Petitioners, hereinafter sometimes referred to as Jockeys, were, on the 3rd day of May, 1968, residents of Hancock County, West Virginia, and were and continue to be jockeys by trade and profession and are currently, as well as were on and before the 3rd day of May, 1968, licensed by the West Virginia Racing Commission and which said licenses were in full force and effect at the filing of the Complaints and are at the filing of this Petition for a writ of error. Your Petitioners were riding at Waterford Park when they were individually served on the 3rd day of May, 1968, with a notice from Waterford Park, Inc., purportedly signed by James F. Edwards, its President, which said notices were dated May 2, 1968, and which advised your Petitioners as follows:

> "The management of Waterford Park, Inc., regretably finds it necessary to withdraw your privileges at all times in the future to enter or remain on the grounds of its race track and racing plant. Management sincerely hopes that you will comply with its decision without the necessity of requiring management to enforce its decision by means permitted by law. Your presence anywhere on the grounds of Waterford Park, Inc., after seven (7) days from the date of receipt of this Notice, necessarily will be construed by

management as an act of trespass for which on discovery management promptly will employ those remedial measures necessary to remove you from the grounds or pursue other legal measures to enforce its decision.

"In the event you have any personal property on the grounds of WATERFORD PARK, INC., you are given twenty-four (24) hours after the seven (7) day period expires to remove it. To remove your personal property, after the seven (7) day period expires, please first notify the guard at the stable gate who will call a member of the Security Police of WATERFORD PARK, INC., to escort you in and out of the grounds for that purpose.

"The management of WATERFORD PARK, INC., has decided permanently to deny you the privilege of admission to its grounds for the reason that such action is decidedly in the very best interests of racing generally and of racing specifically at WATERFORD PARK, INC. Management does not recite the foregoing reasons for its decision because it feels that a reason must be given, but rather to inform you that management has good cause for taking this action and will disclose the facts making up the good cause only when its attorney advises that the disclosure be made or a court of last resort compels that disclosure be made.

"Because management at WATERFORD PARK, INC., in the past has experienced some resistance in the form of threaten legal procedure to its right to exclude racing participants from its grounds, it is suggested that the following court decisions on the subject be consulted:

"*Corrigan* v. *Coney Island Jockey Club,* Two Misc. 512, 22 NYS 394

"*Madden* v. *Queens County Jockey Club,* 269 App Div 644, 58 NYS 2nd 272, affirmed, 296 NY 249, 72 NE 2nd 697, cert. denied 332 US 761, 68 S Ct 63

"*Martin* v. *Monmouth Park Jockey Club,* 145 F. Supp. 439 (Dist. Ct. N.H. 1957).

"WATERFORD PARK, INC.

"By /s/ James F. Edwards
James F. Edwards,
Its President"

Immediately your Petitioners attempted to ascertain from the Stewards at Waterford the reason for said Notices being issued, but were unsuccessful. Your Petitioners likewise attempted to enter Waterford for the purpose of plying their trade but were prohibited from entering; your Petitioners, by their counsel, did on the 7th day of May, 1968, serve upon the West Virginia Racing Commission a Petition requesting a hearing and appeal from said action of Waterford Park, Inc., and Stewards of said track, and in which said Petition your Petitioners recited that they had been offered no explanation or reasons for the action taken by the said James F. Edwards, President of Waterford Park, and that no explanation or specific reasons could be obtained and that they were guilty of no conduct upon their parts, individually or collectively, which could be construed as conduct detrimental to racing in general or racing at Waterford Park specifically; further your Petitioners respectfully requested an immediate hearing and that the West Virginia Racing Commission notify

Waterford Park pending a hearing that the notices be stayed.

By letter dated the 17th day of May, 1968, the West Virginia Racing Commission by Joseph P. Condry, Chairman, advised counsel for your Petitioners as follows:

> "Your petition requesting a hearing from this Commission, on behalf of certain named jockeys at WATERFORD PARK, INC., has been thoroughly reviewed.
>
> "Following due consideration, the Commission respectfully rules as follows: In the matter of ROBERT WILKERSON, MILTON DALGO, and RUSSELL APPLEBEE, there are no Steward ruling upon which an appeal to this Commission can be made.
>
> "Although your petition alleges action on the part of the Stewards in the case of Ray Cooper, the Commission has not received such ruling and information indicates that there is no such ruling pending.
>
> "Since there are no rulings against the named subjects and therefore, no apparent violation of the rules and regulations of this Commission, you are hereby advised that your request for hearings on behalf of the named Jockeys is denied.
>
> "Further it would appear that the relief sought by your petition is not within the jurisdiction of this Commission.
>
> "Very truly yours,
>
> "/s/ Joseph P. Condry
> Joseph P. Condry, Chairman"

Your Petitioners having exhausted the available rights afforded them by attempting to ride at Waterford, and being

excluded; attempting to ascertain the reasons but being refused; and petitioning the West Virginia Racing Commission and being denied a hearing; had no alternative but to institute and proceed upon their respective complaints against the defendants, and from which ruling of the Circuit Court of Hancock County to said Complaints, this Petition for writ of error is respectfully being submitted.

THE COURT'S ACTION

Upon the Complaints filed by your Petitioners seeking a preliminary injunction and as well a permanent injunction against the defendants from interfering in any manner with the plaintiffs in properly and lawfully pursuing their profession and trade as jockeys at Waterford or anywhere else; from interfering by violence, force, intimidation, artifice, stratagems, threats, coercion or in any manner whatsoever with the rights of your Petitioners to lawfully and properly ride at Waterford or elsewhere as the Petitioners so desire, so long as such is done within the Rules of Racing as prescribed by the State of West Virginia or other states; from interfering in any way with the Petitioners' rights of ingress or egress to Waterford Park and parts thereon where their presence may be required by virtue of their profession and trade as jockeys and from interfering with, accosting or restricting in any way whatsoever the movements of the plaintiffs within Waterford Park so long as the same is within the Rules of Racing as prescribed by the West Virginia Racing Commission or which may have been instituted by Waterford at the outset of the current meet and which were made known to the jockeys at Waterford; and from instigating, protecting, aiding, abetting or assisting anyone in the commission of the aforesaid acts, the defendant, Water-

ford Park, Inc., filed its Motion to Dismiss upon the following grounds:

"1. That it is a private corporation licensed by the West Virginia Racing Commission currently to conduct horse racing at its race track located near Newell, Hancock County, West Virginia; and that as a private corporation it has the power and inherent legal right to invite persons to participate in horse racing on its said race course, and to exclude them;

"2. That there is no West Virginia statutory enactment or judicial decision, or Rule of Racing or horse racing custom or tradition limiting or denying this defendant the right to invite persons to participate or to exclude them from participation in horse racing at its race course;

"3. That its said right to invite or to exclude applies equally to patrons and to licensees of the West Virginia Racing Commission;

"4. That the Complaint filed herein fails to state a cause of action against this defendant upon which injunctive relief may be granted;"

The Defendants, Carlyle Johnson, Jay Eyster, and Joseph P. Brocator filed their Motion to Dismiss upon the following grounds:

"1. That they are members of the Board of Stewards appointed by the West Virginia Racing Commission to serve during the racing meet currently conducted at the race track of Waterford Park, Inc., under license issued by the West Virginia Racing Commission; that

under and by virtue of the laws of the State of West Virginia, the said Board of Stewards is an agency of the said West Virginia Racing Commission which Commission under and by virtue of the laws of the State of West Virginia is an administrative agency of the said state; that as members of the said Board of Stewards, these defendants are prohibited by statute (Michie's Serial Section 2200(15)) from interfering 'in the internal business or affairs of any licensee'; that the word 'licensee' appearing in said statute refers exclusively to a racing association or other person licensed to conduct horse racing in West Virginia, as will more fully appear from a reading of Chapter 19, Article 23, Sections 1 through 17 of the West Virginia Code (Michie's Serial Sections 2200 (1) through 2200 (17)); and that the action complained of by the plaintiff in the Complaint filed in this cause is an action involving the internal affairs of the defendant, Waterford Park, Inc.;

"2. That these defendants have not and as a matter of law do not have any right to interfere with the right of the defendant, Waterford Park, Inc., to administer its own internal affairs including the relationship between it and the plaintiff(s) herein insofar as the said action complained of against the said defendant, Waterford Park, Inc., as alleged by the plaintiff herein is concerned; that the said plaintiff has not in his said Complaint alleged any violation by the defendant, Waterford Park, Inc., of any specific statute or specific rule of racing; that these defendants are not aware of the violation on the part of the defendant, Waterford Park, Inc., of any applicable statute

or any rule of racing in connection with the action complained of by the plaintiff; and that, moreover, these defendants aver and say that the said plaintiff has not alleged that he has ever made any complaint, formal or otherwise, to these defendants as individual members of the Board of Stewards, or as the Board of Stewards, concerning any action of the defendant, Waterford Park, Inc., and particularly the action complained of in his Complaint against the said defendant, Waterford Park, Inc.;

"3. That these defendants as individual members of the said Board of Stewards, or as the said Board of Stewards, have not taken any action and have not participated in the said action taken by the defendant, Waterford Park, Inc., about which action the plaintiff complains;

"4. That these defendants have not concurred in said action charged to the defendant, Waterford Park, Inc., either as individual members of the said Board of Stewards, or as the Board of Stewards, as is alleged in paragraphs numbered (12) and (15) of the Complaint filed herein; that, moreover, any concurrence on the part of these defendants individually as members of the said Board of Stewards or collectively as the Board of Stewards must be by official action, and none is alleged in the said complaint; and that the allegation contained in paragraph numbered (14) of said Complaint whereby the said action of the defendant, Waterford Park, Inc., is averred as 'a clear and unequivocal indication of the concerted activities, designs and motives of the defendants to remove from 'Waterford' any person or persons who do not con-

form to the personal desires and designs of the defendants . . . ' is not a sufficient allegation on which to predicate an injunction against these defendants;

"5. That these defendants are not charged in the said complaint with participation or conspiracy in the 'unfounded, unlawful, illegal, fraudulent and unwarranted action of "Waterford" . . . ' by the language set forth in paragraph numbered (15);

"6. That the charges of the plaintiff against this defendant as recited in paragraphs numbered (18) and (19) of the said Complaint are without factual allegations to support them, and by reason thereof are gratuitous allegations and therefore, as a matter of law, cannot serve as grounds on which injunctive relief may be lawfully predicated;

"7. That the Complaint fails to allege any official act of omission or commission against the said plaintiff by these defendants individually as members of or as the Board of Stewards at the race track of said defendant, Waterford Park, Inc., though the Complaint seeks injunctive relief against these defendants in their individual official capacities as Stewards and not in their capacities as individuals;

"8. That the said plaintiff was one of four jockeys who filed a 'Request for Hearing and Appeal from Action of Waterford Park, Inc., and Stewards of said Track'; that among the allegations contained in their 'Petition for Hearing,' the said plaintiff charged that James F. Edwards, President, gave him notice that he would forever be barred from racing at Waterford Park race track, Chester, West Virginia, and that

'no explanation or reasons for this action . . .' were given to the plaintiff herein; that in said petition the plaintiff demanded that said notice be stayed and that the said notice be permanently quashed upon a full and complete hearing of these matters'; that a copy of said 'Petition for Hearing' is hereto attached and herewith made a part hereof as though set out in full; that said 'Petition for Hearing' was received by the West Virginia Racing Commission on May 8, 1968, and on May 17, 1968, said West Virginia Racing Commission issued its opinion denying plaintiff's request for a hearing or an appeal on the following grounds:

"A. That there was no Steward ruling on the case of this plaintiff upon which an appeal to the Commission can be made;

"B. That there was no ruling against this plaintiff and, therefore, no apparent violation of the rules and regulations of the Commission;

"C. That it is apparent that the relief sought by the plaintiff in said petition was not within the jurisdiction of the Commission;

"9. That by statute, the Legislature of the State of West Virginia has created the said West Virginia Racing Commission and has granted it exclusive power and authority over the conduct of horse racing in West Virginia and to formulate reasonable rules and regulations to govern all horse racing activity in the State of West Virginia; and that, accordingly, if the plaintiff is aggrieved by any action of the said Racing Commission, the plaintiff's exclusive remedy is an

appeal from the decision of the said Racing Commission and not by the initiation of a civil action seeking by way of injunctive relief to reverse the decision of the said Racing Commission which tribunal denied the plaintiff's claim that the defendant, Waterford Park, Inc., and the action of these defendants in allegedly concurring with said action of said Waterford Park, Inc., was, as charged in paragraph numbered (9) of the Complaint filed herein, in violation of the West Virginia Racing Statutes and the rules and regulations promulgated by the West Virginia Racing Commission;

"10. That these defendants are made parties defendant to this action in their individual official capacities as Stewards and are, therefore, individual members of and administrative agency required to perform certain well-defined and expressed administrative and quasi-judicial acts, and, hence, no action for damages and no action by way of injunctive relief may lawfully be maintained against them in their said individual official capacities or in their collective capacities as a Board of Stewards for their failure to perform any administrative or quasi-judicial acts or to compel them to perform any administrative or quasi-judicial acts."

The Court granted the Motion to Dismiss of the defendant, Waterford Park, assigning the reason that, "The law would seem to be settled that a race track does have the right to exclude from the course whomsoever it pleases for whatsoever reason. This would apply equally to patrons and jockeys. . . . It is true that there is no West Virginia ruling on this issue. This Court, however, is a nisi prius

court and is bound as a matter of policy to follow the settled law of this country, unless it is in conflict with higher authority in this State. I, therefore, reluctantly rule, without regard to equities which may or may not be present on either or both of the sides of this controversy, that Waterford does have the right to exclude, whether it be patron, rider or anyone else. The sole exception so far as the cases are involved would appear to be exclusion because of race, creed or color."

The Court similarly granted the Motions to Dismiss of Carlyle Johnson, Jay Eyster and Joseph P. Brocator, all Stewards at Waterford, on the basis that they are an agency of the West Virginia Racing Commission and that venue against them was improperly laid in Hancock County.

Assignment of Errors

Your Petitioners respectfully assign the following errors:

1. That the action of the Court was contrary to the applicable law and the undisputed facts.

2. That the Court erred in sustaining the Defendants' Motions to Dismiss.

3. That the Court erred in ruling that Waterford did have the right to exclude your Petitioners "at will" under "the absolute common law right" of exclusion.

4. That the Court erred in ruling that Waterford could exclude state licensees without reason or just cause.

5. That the Court erred in ruling that Waterford, as a state licensee and creature created by the state legis-

lature to conduct horse racing and betting, has rights other than those expressly granted by the state.

6. That the Court erred in ruling, in effect, that your Petitioners, state licensees, had no judicial or administrative recourse to the actions of Waterford.

7. That the Court erred in ruling, in effect, that Waterford may act arbitrarily and capriciously against any individuals, and in particular your Petitioners, in derogation of rights granted under licenses issued by the West Virginia Racing Commission.

8. That the Court erred in granting Defendants, Carlyle Johnson, Jay Eyster and Joseph P. Brocator, parties defendants to these proceedings, Motions to Dismiss, by failing to consider the provisions of *Chapter 29A, State Administrative Procedures, West Virginia Code Annotated*, Article 4, Section 2 (b) and Chapter 29A, Article 5, Sections 1 and 4.

9. That the Court erred in granting the Defendants' Motions to Dismiss without regard to the law of West Virginia as regards licensees of the state.

10. That the Court erred in granting the Defendant's, Waterford Park, Motion to Dismiss without regard to and contrary to your Petitioners' rights under the First, Fifth and Fourteenth Amendments to the United States Constitution, and the Supreme Court of the United States' decision concerned therewith.

11. That the Court erred in holding in substance that the exclusion of state licensees, and in particular your Petitioners, was an internal matter of Waterford.

12. That the Court erred denying your Petitioners due process of law in upholding their exclusion by Waterford without any judicial recourse.

13. That the action of the Court was contrary to the West Virginia Rules of Racing which prescribe how a jockey may have his license revoked or suspended and how he is to be ruled off of a track.

Your Petitioners, therefore, pray that this Honorable Court grant them an appeal from the judgment of the Circuit Court of Hancock County, West Virginia, entered on the 15th day of July, 1968, to the end that the same may be reviewed, that a writ of error be awarded and other necessary relief granted.

ROBERT WILKERSON, RUSSELL APPLEBEE, and MILTON J. DALGO, *Petitioners*

DONELL, TARR & DELAMATER, *Counsel*

By /s/ DONALD R. DONELL
Donald R. Donell

STATE OF WEST VIRGINIA
COUNTY OF HANCOCK, to-wit:

I, DONALD R. DONELL, an attorney at law, practicing in the Supreme Court of Appeals in the State of West Virginia do hereby certify that in my opinion the judgment complained of in the foregoing Petition is erroneous and should be reviewed by the Supreme Court of Appeals of the State of West Virginia.

/s/ DONALD R. DONELL
Donald R. Donell

APPENDIX D

Copies of the Judgments of the Circuit Court of Hancock County, West Virginia and the Supreme Court of Appeals of West Virginia

IN THE

CIRCUIT COURT OF HANCOCK COUNTY,
WEST VIRGINIA

Civil Action No. 3972

ROBERT WILKERSON,

Plaintiff,

—v.—

WATERFORD PARK, INC., *et al.*,

Defendants.

Civil Action No. 3973

RUSSELL APPLEBEE,

Plaintiff,

—v.—

WATERFORD PARK, INC., *et al.*,

Defendants.

Civil Action No. 3974

MILTON J. DALGO,

Plaintiff,

—v.—

WATERFORD PARK, INC., *et al.*,

Defendants.

ORDER

These consolidated causes of action came on to be heard upon the verified "Complaints"; upon the "Motion to Dismiss" filed by the defendant, Waterford Park, Inc.; upon the "Motion to Dismiss" filed in behalf of the defendants, Carlyle Johnson, Steward, Jay Eyster, Steward, and Joseph P. Brocator, Steward; upon the separate answer of Waterford Park, Inc.; upon the separate answer of Carlyle Johnson, Steward, Jay Eyster, Steward, and Joseph P. Brocator, Steward; upon oral arguments of counsel, upon plaintiffs' "Memorandum" submitted in behalf of the plaintiffs; upon the "Supplemental Memorandum No. 2 in Behalf of Jockeys"; upon the "Supplemental Memorandum in Behalf of Plaintiffs"; upon the "Note of Argument in Behalf of Waterford Park, Inc."; upon the "Supplemental Note of Argument in Behalf of Waterford Park, Inc."; upon "Defendants' Reply to Supplemental Memorandum No. 2 in Behalf of Jockeys"; and upon the agreement of the parties that the Court first consider the issues of law raised by said Motions to Dismiss.

Thereupon the Court considered of its opinion and rendered its Memorandum.

Thereupon defendants moved that the said "Memorandum" of the Court be filed and be made a part of the record of these proceedings which motion was granted and the same Order filed and made a part of these proceedings.

Accordingly, it is ADJUDGED and ORDERED that the Motion to Dismiss of the defendant, Waterford Park, Inc., be and it is hereby granted; and the Motion to Dismiss of the said defendants, Carlyle Johnson, Steward, Jay Eyster, Steward, and Joseph P. Brocator, Steward, be and it is

hereby granted; and the said Complaints against the said defendants be and they are hereby dismissed at plaintiffs' costs. The plaintiffs, and each of them, are hereby saved exceptions to this action of the Court.

Entered this 15th day of July, 1968.

/s/ JAMES G. MCCLURE
Judge

HAVE SEEN:

/s/ DONALD R. DONELL by W. DEAN DELAMATER
Donald R. Donell *for Plaintiffs*

/s/ FRANK A. PIETRANTON
Frank A. Pietranton *for Defendants*

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th day of May, 1969, the following order was made and entered, to-wit;

ROBERT WILKERSON,

—VS.—

WATERFORD PARK, INC., *et al.*

RUSSELL APPLEBEE,

—VS.—

WATERFORD PARK, INC., *et al.*

MILTON J. DALGO,

—VS.—

WATERFORD PARK, INC., *et al.*

On a former day, to-wit, March 4, 1969, came the petitioners, Robert Wilkerson, Russell Applebee and Milton J. Dalgo, by Donell, Tarr & DeLaMater and Donald R. Donell, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Hancock County rendered in this action on the 15th day of July, 1968, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest:

/s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals